PUBLIC PROSECUTOR v. KIRUBAKARAN

[A.Cr.J. (Chang Min Tat J.) March 21, 1974]
[Penang — Juvenile Appeal No. 1 of 1974]

Criminal Law and Procedure — Trial before Juvenile Court — Appeal — Whether Public Prosecutor can appeal from decision of Juvenile Court — Criminal Procedure Code (SS. Cap. 21), s. 300 — Juvenile Courts Act, 1947, s. 14(1).

In this case the Public Prosecutor had appealed against an order of acquittal and discharge made by the President, Sessions Court, Butterworth, sitting as a Juvenile Court. The question arose as to whether the Public Prosecutor was competent to prefer an appeal in a Juvenile Court decision.

Held: section 14 of the Juvenile Courts Act deprives the Public Prosecutor of his competency to appeal against the decision of a Juvenile Court.

Cases referred to:-

(1) *Public Prosecutor* v. *Rudguard* [1939] M.L.J. 56; [1938] F.M.S.L.R. 215.

(2) *Attorney-General* v. *Sillem* 10 H.L.C. 704 at p. 724; 11 E.R. 1200 at p. 1209.

(3) *Khor Swee Kim* v. *Public Prosecutor* [1953] M.L.J. 117.

JUVENILE APPEAL.

T. Selventhiranathan (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Chang Min Tat J.: This is an appeal, now listed in accordance with the provisions of section 14(2) of the Juvenile Courts Act 1947 as Juvenile Appeal No. 1 of 1974, by the Public Prosecutor from the "acquittal and discharge" ordered by the President, Sessions Court, Butterworth. The order was made at the close of the case against the alleged offender. His defence was not called.

At the outset of the appeal, I drew the attention of the learned Deputy Public Prosecutor to section 14(1) of the Act and I invited him to satisfy me on the competency of the Public Prosecutor to prosecute the appeal.

Section 14(1) reads —

"Any child or young person or his parent or guardian aggrieved by any finding or order of a Juvenile Court may appeal to the High Court against the finding or order in accordance with any law in force for the time being regulating criminal appeals to the High Court from a Sessions Court."

The learned Deputy Public Prosecutor contended that section 4(5) applies the provisions of the Criminal Procedure Code to Juvenile Courts as if Juvenile Courts were Sessions Courts and accordingly the provisions of section 300 Criminal Procedure Code (S. S. Law Cap. 21) which is in these words:

"300. When an accused person has been acquitted by a Sessions Court or Magistrate's Court there shall be no appeal except by the Public Prosecutor."

enable the Public Prosecutor to prefer this appeal.

He could have also submitted that the right of any person dissatisfied with any judgment, sentence or order by any Sessions Court or Magistrate's Court in a criminal case or matter to appeal against such judgment, sentence or order, included the right of the Public Prosecutor who was dissatisfied with the order of acquittal. He would have found support in the decision in *Public Prosecutor* v. *Rudguard*[1] that the Public Prosecutor came under the description of "any person" in this section.

It would be salutary at this stage to reconsider what is the right of appeal. *Mallal's* Criminal Procedure (4th Edition) at page 446 has this to say —

"The right of appeal is only by statute. It is not in itself a necessary part of the procedure in any action but 'is the right of entering a superior court and invoking its aid and interposition to redress the error of the court below. It seems absurd to denominate this paramount right part of the practice of the inferior tribunal'."

The quotation which the learned editor cited was from the judgment of Lord Westbury, L.C. in *Attorney General* v. *Sillem*.[2]

Earlier in his judgment Lord Westbury L.C. said at pages 720-721 of 10 H.L.C. and at pages 1207-1208 of 11 E.R.:

"The creation of a new right of appeal is plainly an act which requires legislative authority. The court from which the appeal is given and the court to which it is given, must both be bound and that must be the act of some higher power. It is not competent to either tribunal or to both collectively, to create any such right. Suppose the Legislature to have given to either tribunal, that is, to the Court of the First Instance and to the Court of Error or Appeal respectively, the fullest power of regulating its own practice or procedure, such power would not avail for the creation of a new right of appeal, which is in effect a limitation of the jurisdiction of one court, and an extension of the jurisdiction of another. A power to regulate the practice of a court does not involve or imply any power to alter the extent or nature of its jurisdiction. Accordingly it was necessary in the Act (of 1854) not only to give new rights of appeal, but to define and bind certain courts to entertain the appeals so given."

With respect in my view the force of this passage is equally applicable to the consideration whether there is a right of appeal or to the further consideration whether the right of appeal provided in any law of procedure is or is not limited by new provisions in the substantive enactment.

See also *Khor Swee Kim* v. *Public Prosecutor*[3] where the then Court of Appeal held that —

"There is no general right of appeal. Apart, possibly, from the Royal Prerogative, appellate jurisdiction is solely a creation of statute and it extends only so far as the words of the statute necessarily require."

A general right of appeal is given in section 302, except in a case to which section 296 applies, to any person who is dissatisfied with the decision of the magistrate or president, but the person must be a party to the case. As observed earlier, he includes the Public Prosecutor. This is the ordinary position under the Criminal Procedure Code. But if the law can confer the right, it can with equal competence take away the right.

It was however contended that the right of the Public Prosecutor to appeal from a finding of not guilty either under the general provisions of section 302 or the special provisions of section 300 which specifically provides that the Public Prosecutor is the only person who can appeal from an acquittal has been preserved in the Juvenile Courts Act by section 4(5) of the Act. By this section, the provisions of the Criminal Procedure Code apply to Juvenile Courts as if Juvenile Courts were Sessions Courts. With the greatest of

respect, I cannot accept this bare contention. Section 4(5) clearly provides for the application of the Criminal Procedure Code *"save as modified or extended by this Act."*

The question must then remain whether section 14 is a modification or extension of the Criminal Procedure Code. In my view and with respect, section 14 is both a modification and an extension. The right of the child or young person who is a party to the criminal action has been preserved. And it is now extended to his parent or guardian, a person who would not normally come within section 302 of the Criminal Procedure Code as not being a party to the action. Then, applying the ordinary rules of construction to a penal statute, and especially the rule that *"Generalia specialiabus non derogant"*, section 14 must be seen to deprive the Public Prosecutor of his competency to appeal from a decision of the Juvenile Court. To this extent, it is therefore a modification of the Criminal Procedure Code.

This must, in my view, seem to be so, because if it is merely intended to extend the right of appeal to the father or guardian, it would be a redundancy to reaffirm the right of the child or young person who is the subject of Juvenile Court proceedings. Further, it would have been sufficient and would be normal drafting practice to provide that nothing in this section should be taken to render void the provisions of appeal in the Criminal Procedure Code. Or, section 14 could have been expressed to say that in addition to the Public Prosecutor or child or young person, the parent or guardian of the child or young person may appeal.

Consequently I take the view that on a proper and reasonable construction of section 14, the enumeration of the persons given the right to appeal in a Juvenile Court case must mean that by deliberate exclusion, the Public Prosecutor is not competent to prefer an appeal.

An effort was made to salvage the proceedings by stressing the use of "may" in section 14 on the contention that an appeal was discretionary, and therefore the Public Prosecutor was not excluded. But in the nature of things, appeals have always been matters of deliberate election and no legislature can direct any person to do any act which it is within his own choice either to do or not to do. What the legislature can do is to provide access to a superior court and to limit, if it so chooses, such access to such persons as it deems proper, in the scheme it has for the administration of justice in the country.

The appeal is therefore dismissed on the lack of competency of the Public Prosecutor to prefer an appeal in a Juvenile Court decision.

Appeal dismissed.

SING LIAN EXPRESS SDN. BHD. v. SOH KIM TEE

[O.C.J. (Syed Othman J.) March 23, 1974]
[Johor Bahru — Originating Summons No. 48 of 1973]

Land Law — Sale of land — Option to purchase — Caveat — Ex parte extension — Caveatable interest — Whether option holder has — National Land Code, ss. 326, 327.

The applicant gave the respondent on receipt of $1000, an option to be exercised within a certain period for the sale of the applicant's land. The respondent exercised the option, offered to pay the deposit and asked the applicant to sign a draft agreement. The applicant refused to sell the land and sign the agreement.

The respondent thereupon lodged a caveat against the land and filed an action against the applicant for specific performance or alternatively for damages for breach of contract.

The applicant caused a notice of intended removal of the caveat pursuant to the provisions of the National Land Code to be served on the respondent. The respondent made a successful *ex parte* application for the caveat to be extended until the final disposal of the court action. This application by the applicant was to set aside the caveat on the grounds that the *ex parte* extension of the caveat had been issued without the applicant having had an opportunity of being heard and that the respondent was not a person entitled to claim title to or a registrable interest in the land.

Held: (1) a *prima facie* case had been made out for the extension of the period of the caveat and in addition there were only a few days before the expiry of the period allowed by the National Land Code for the notice of intended removal of the caveat. The circumstances clearly required that the court should act *ex parte* and it did so;

(2) the applicant was not thereby under the provisions of the National Land Code shut out from its rights to challenge the extension of life of the caveat as it had by means of this application;

(3) as the respondent had given irrevocable proof of his willingness to purchase the land, an offer had been made to pay the deposit and a draft agreement prepared, he therefore had a caveatable interest.

Cases referred to:-

(1) *Koh Peng Moh* v. *Yahiya* [1965] M.L.J. 230.

(2) *McCallum* v. *Hicks* [1950] 2 K.B. 271.

ORIGINATING SUMMONS.

Navaratnam for the applicant.

Gan Kim Seng for the respondent.

Syed Othman J.: The applicant (the company) seeks to set aside a caveat issued by this court. These are the circumstances which led the court to issue the caveat: On 14th November, 1972 the applicant on receipt of $1,000 gave the respondent an option to be exercised by 30th November, 1972, for the sale of the company's land, held under Certificate of Title 989, Lot No. 2922 and measuring 118 acres 1 rood 10 poles, for $8,000 per acre. On the 15th November, 1972 the respondent with his solicitor went to see the managing director of the company in Malacca. On the respondent's instruction, the solicitor exercised the option, offered to pay 10% deposit ($94,000) and asked the managing director to sign a draft agreement which had been prepared. The managing director refused to sell the land and sign the draft agreement. The solicitor and the respondent left the managing director. On